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July 7, 2006

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: Cellular early termination fees, WT Dockets 05-193, 05-194  
*Ex parte communication pursuant to Section 1.1206 of the Rules.*

Dear Ms. Dortch:

Yesterday, representatives of Wireless Consumers Alliance (“WCA”) met with FCC staff to discuss recent developments in the referenced dockets. Carl Hilliard, Scott Bursor and I spoke from the appended outline and distributed copies of the *Pacific Bell Wireless v. CPUC* decision listed on the last page of the handout. We met with Angela Giancarlo, Bruce Gottlieb, Monica Desai, Jay Keithley, Matthew Berry, Joel Kaufman, Chris Killion, Aaron Goldberger and Fred Campbell.

Please direct any questions to the undersigned.

Sincerely,

James R. Hobson

**MILLER & VAN EATON, P.L.L.C.**

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cc: Fred Campbell, Bruce Gottlieb, Barry Ohlson, Monica Desai, Matthew Berry,  
Aaron Goldberger, Angela Giancarlo

**Wireless Consumers Alliance Preemption Presentation Re Cellphone Carriers'  
Early Termination Fees ("ETFs") (Docket Nos. 05-193 and 05-194)**

**I. Verizon's Recent Announcement That It Will Pro-Rate Its ETF**

- A. Contradicts specific statements in Professor Hausman's and Dr. Furchtgott-Roth's testimony.
- B. Calls into question the very purpose of these proceedings. Why should the Commission fundamentally rewrite the balance of state and federal authority just to protect flat-fee ETFs of dubious legality which industry leaders are abandoning?
- C. So far as WCA is aware, no pro-rated ETF has ever been challenged under any state's law.

**II. *Pacific Bell Wireless, LLC v. Public Utilities Commission of the State of California*, Case No. G034991 (Cal. Ct. App., 4<sup>th</sup> Dist., June 20, 2006)**

- A. First appellate decision to directly address the question of whether a state law challenge to a CMRS carrier's ETF is preempted rate regulation under 47 U.S.C. § 332(c)(3)(A).
- B. Specifically held that the PUC's "challenge to the ETF and to Cingular's policy of permitting no grace period ... is not a preempted regulation of rates or of market entry." *Id.* at 18.
- C. This appellate court's conclusion that Cingular's ETF is not a "rate charged" is consistent with the nearly unanimous view of state and federal courts that have previously considered the issue. (*See* attached appendix of cases.)

**III. No Economic Or Factual Basis For Professor Hausman's Opinions Concerning ETFs**

- A. WCA's response to Professor Hausman's testimony, and the declaration of economist Lee L. Selwyn (submitted under seal on May 11, 2006 and May 23, 2006) demonstrate numerous errors in Professor Hausman's economic analysis.

- B. Judge Sabraw rejected Professor Hausman's arguments – finding them “not persuasive” – in granting plaintiffs' class certification motion in the California Litigation.
- C. Professor Hausman's opinions are further undermined by Mr. Strigl's recent statements concerning Verizon's move to pro-rated ETFs.
- D. Bringing wireless carriers' ETFs into compliance with the same state laws that apply to all other businesses will spur inter-carrier competition and lead to lower prices.

Appendix Of Cases

One state appellate court has ruled that ETFs are not “rates charged” and that claims challenging them are not preempted under § 332:

- *Pacific Bell Wireless, LLC v. Public Utilities Commission of the State of California*, Case No. G034991 (Cal. Ct. App., 4<sup>th</sup> Dist., June 20, 2006)

Six federal district courts have ruled that ETFs are not “rates charged” and that claims challenging them are not preempted under § 332:

- *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004)
- *Zobrist v. Verison Wireless*, No. 02 Civ. 1000-DRH (S.D. Ill. Dec. 3, 2002)
- *State of Iowa v. United States Cellular Corporation*, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000)
- *Cedar Rapids Cellular Telephone LP v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000)
- *Carver Ranches Washington Park v. Nextel South Corp.*, Case No. 04-CV-80607 (S. D. Fla. Sept. 23, 2004)
- *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996)

Two state courts have ruled that ETFs are not “rates charged” and that claims challenging them are not preempted under § 332:

- *Hall v. Sprint*, State of Illinois, Third Judicial Circuit, Case No. 04L113 (Aug. 10, 2004)
- *Kinkel v. Cingular Wireless, LLC*, Case No. 02-999-GPM, (S.D. Ill. Nov. 8, 2002)

Only two reported cases involving the same district judge and same plaintiffs’ lawyers – who failed to attend the hearing to argue the issue – have held the contrary:

- *Redfern v. AT&T Wireless Services, Inc.*, 2003 U.S. Dist. LEXIS 25745, at \*2 (S.D. Ill. 2003) (“no one attended the hearing on Plaintiff’s behalf”)
- *Chandler v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. 2004) (same district judge cited his prior ruling in *Redfern* and reached the same conclusion with no further analysis)